

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 4.11.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

C.R.P.(PD) No.1863 of 2003 and
C.M.P.No.13804/2003

Murugan .. Petitioner/Plaintiff.

vs.

1.Sumathradevi

2.Durairaj

.. Respondents/Defendants.

Revision Petition filed under Section 115 of CPC against the order dated 11.6.2002, made in I.A.No.305/2001 in O.S.No.136/2000, on the file of the Addl. District Munsif, Mayiladuthurai.

For Petitioner : Mr.S.Sounthar
For Respondents : No Appearance

ORDER

This Revision Petition has been filed against the order dated 11.6.2002, made in I.A.No.305/2001 in O.S.No.136/2000, on the file of the Addl. District Munsif, Mayiladuthurai.

2. The plaintiff is the revision petitioner.

3. The suit in O.S.No.136/2000 has been filed by the revision petitioner/plaintiff against the respondents/ defendants for recovery of money with interest. The said suit was resisted by the defendants/respondents by filing a written statement. Pending suit, the plaintiff filed I.A.No.305/2001 to permit him to mark an unregistered mortgage deed executed by the defendants in favour of the plaintiff as an Exhibit. It was the case of the plaintiff in that application that the suit was filed on the basis of an unregistered mortgage deed executed by the defendants in favour of the plaintiff. Therefore reliance was placed by the plaintiff on the said document for proving the loan amount. Hence the said application was filed by the plaintiff for admitting the document as an Exhibit. A memo of objection was filed by defendants/respondents on the ground that the said document is not duly stamped and registered in accordance with law and hence they protested for marking the said document

as an Exhibit.

4. The trial court by an order dated 11.6.2002 dismissed the application on the ground that this document filed by the plaintiff is not a registered one. It is also stated by the trial court that any document pertaining to immovable property with the value of more than a sum of Rs.100/-, the said document has to be necessarily registered. In this case, the document being a mortgage document and the value of it is more than Rs.100/- non-registration of the same cannot be accepted and the document cannot be marked as an Exhibit. Therefore on this ground, the trial court did not accept the case of the plaintiff and rejected the same. Challenging the said order, the above revision petition has been filed.

5. Heard the learned counsel for the petitioner and the respondents though served, there was no appearance by them either in person or through counsel.

6. The learned counsel for the petitioner submitted that the petitioner only wanted to prove the payment of loan amount to the respondents herein and for this limited purpose the document in question is admissible in evidence. He further contended that the petitioner is not relying on the document to prove the mortgage liability of the respondents and therefore the non-registration of the document cannot be held against the petitioner.

7. Learned counsel for the petitioner relied on the following decisions in support of his contention:-

- (i) AIR 1931 Madras 124 (JAGANNADHAM v. OFFICIAL ASSIGNEE, MADRAS).
- (ii) AIR 1934 MADRAS 178 (LAKSHMAN v. JAYARAM)
- (iii) 1939 MLJ 664 (KODA NAYAKAMMA v. VENKAYYA)
- (iv) 2001-1-L.W.613 (JOSEPH, P. v. M.T.SANTIAGU)

8. I have considered the submissions of the learned counsel for the petitioner.

9. (i) In AIR 1931 Madras 124 cited supra, the Division Bench of this court held as follows:-

"The learned Judge however considered that it was open to him to give a decree upon the promissory note and against this decree the defendant has appealed. The decree was preceded by an order allowing amendment of the plaint, so as to comprise a prayer for a personal decree upon the promissory note. This order has been attacked before us, principally on the ground that when it was made, the claim under the promissory note was time barred. But I do not think we need consider whether or not the amendment should have been allowed because on the plaint as it originally stood it seems

clear that a decree of this character could be granted. Apart from a general prayer:

"for such further and other reliefs as to this Honorable Court may seem meet or the nature of the case may require."

Para 14 of the plaint asks that the defendant be directed to pay to the plaintiffs the sum named and goes on in the ordinary terms of a mortgage suit, to ask for the sale of the properties and if the proceeds are not sufficient, for a personal decree. It was I think clearly within the competence of the Court, upon failure of the mortgage, to give such a decree on a plaint so framed. It has been held by a Full Bench of this court in P.V.M.Kunhu Moidu v. T.Madhavan menon (5) that a personal covenant to pay may be proved by a mortgage invalid for defect of attestation, and I think it is incontestable that a trial court on finding a mortgage to be invalid for this or any other reason, may give a decree on the personal covenant which it contains, provided of course that it be not barred. The only case to the contrary cited before us is Gajadhar Mahton v. Ambika Prasad Tiwari (6), where their Lordships of the Privy Council decided, clearly in the special circumstances of that case, that they should not themselves give a decree of this nature. Nor do I think that where, as here, the debt is embodied in a promissory note which forms the basis of the invalid mortgage the court is any more disqualified from giving a decree upon that note. In the result I would dismiss both these appeals with costs."

(ii) In AIR 1934 MADRAS 178 cited supra, the Division Bench of this court held as follows:-

"The observations of their Lordships are to the effect, that the mortgage debt as such can be dissociated from the security for the repayment of the debt; and if there is no bar to the admissibility of a document for the purpose of showing the transfer of the debt itself, apart from the security, the appropriate relief, which ought to be given to the plaintiff, should not be denied to him. At p.594 it is observed thus:

"The debts may be secured either on immovable property or on merchandise; they may be wholly secured or partly secured the security may have been given when the debt was created or later; but in any case, the debts exist as movable property and do not, if secured, become identified with the security or transformed into the land in the one case or merchandise in the other. The separation between debt and security is well established the creditor is entitled to take a judgment

for the debt without having recourse to his security." Applying this principle to the present case, the plaintiff can very well take a judgment for the debt in question, even though no relief can be given to him with respect to the security as he wants."

(iii) In 1939 MLJ 664 cited supra, the Division Bench of this court held as follows:-

"We are therefore reluctantly forced to come to the conclusion that the mortgage deed has not been duly proved to be executed by the first defendant and a decree on the mortgage cannot be sustained and must be set aside. But Mr. Ramachandra Rao contends that there is a personal covenant in the document and on the strength of that personal covenant it is open to us to pass a money decree in favour of the plaintiff for the amount claimed. This can be done. (Vide Kunhu Moidin v. Madhava Menon) Therefore, while we set aside the mortgage decree as passed by the lower court, we pass a decree against the defendants for the amount claimed in the plaint with interest at the contract rate up to date of plaint and at 6 per cent from date of the plaint."

(iv) In 2001-1-L.W.613 cited supra, a learned Judge of this court held as follows:-

" 4. Though notice was served on the respondent and his name printed in the cause list, no attempt was made by him to contest the case. On going through the order passed by the lower court and after hearing counsel for petitioner and perusing the records, I find that the order of the lower court requires interference. Since the mortgage deed is unregistered, at the most it could be said that plaintiff cannot enforce, as if it is a mortgage. But it could be taken as an agreement of loan, and the loan could be proved on the basis of admission in the document itself. As there is no change of cause of action nor in the nature of the suit, the finding of the lower court that the plaintiff is not entitled to amend the plaint is not correct. Hence the order of lower court is set aside and this Revision is allowed."

10. From the above decisions, it is very clear that an unregistered mortgage deed could be taken as an agreement of loan and the loan could be proved on the basis of the admission in the document itself. Therefore, the trial court is erred in law in rejecting the case of the petitioner/plaintiff and the trial court is directed to permit the revision petitioner/ plaintiff to mark the said document namely the unregistered mortgage bond dated 3.7.1997 as exhibit on the side of the

revision petitioner/plaintiff for the limited purpose of proving the loan amount.

11. In the result, the Civil Revision Petition is allowed. No costs. C.M.P.No.13804/2003 is closed.

Sd/-
Asst. Registrar.

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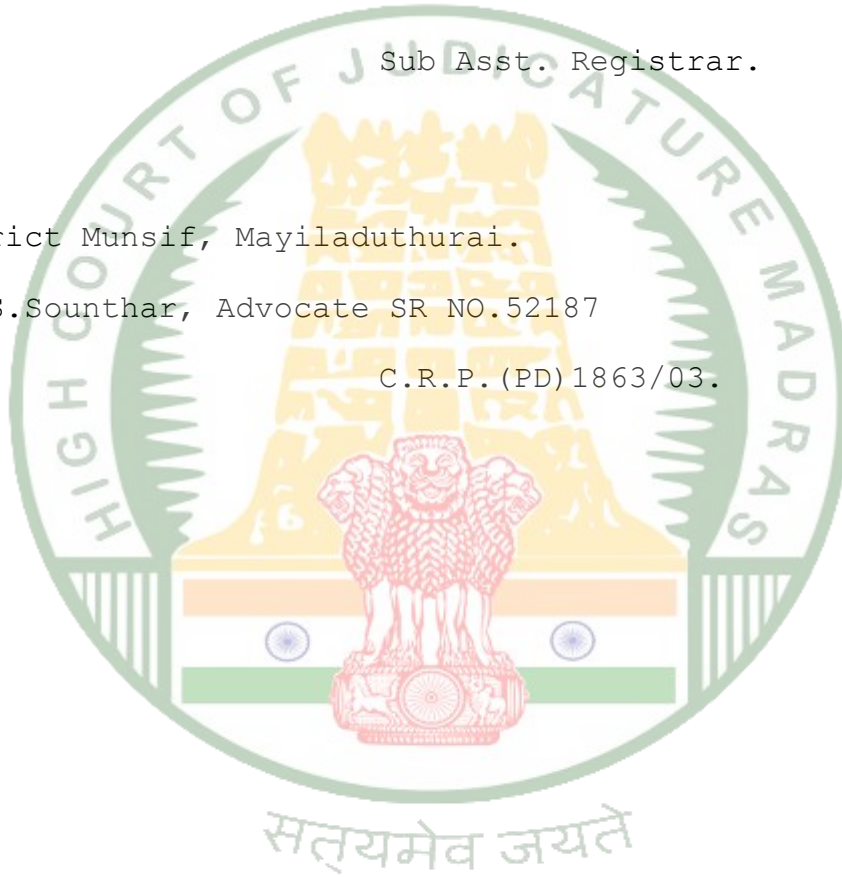
sks/tsv. Sub Asst. Registrar.

To
The Addl. District Munsif, Mayiladuthurai.

+ 1 CC To Mr. S.Sounthar, Advocate SR NO.52187

C.R.P. (PD) 1863/03.

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